No. 91-1114

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

CALIFORNIANS FOR A CITIZEN GOVERNMENT,
Petitioner,

v.

THE LEGISLATURE OF THE STATE OF CALIFORNIA; THE SENATE OF THE STATE OF CALIFORNIA; THE ASSEMBLY OF THE STATE OF CALIFORNIA; DAVID ROBERTI; WILLIE L. BROWN, JR.; KENNETH L. MADDY; WILLIAM A. CRAVEN; A. ALAN POST; CALIFORNIA TEACHERS ASSOCIATION; BLACK AMERICAN POLITICAL ASSOCIATION OF CALIFORNIA; ED DAVIS; CECIL GREEN; GARY K. HART; BILL LOCKYER; DAN MCCORQUODALE; ROBERT PRESLEY; DIANE WATSON; BRUCE BRONZAN; PETER R. CHACON; JIM COSTA; DAN E. HAUSER; JOHAN KLEHS; BARBARA LEE; LUCILLE ROYBAL-ALLARD; ALICE HUFFMAN; AURORA CASTILLO; DEBORAH SEILER; MARSHALL SHARPE; PERCY STEELE; STEVE THOMPSON; NEWTON WALLACE; and BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
Respondents.

On Petition for Writ of Certiorari To the California Supreme Court

BRIEF IN OPPOSITION OF RESPONDENT BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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QUESTION PRESENTED

Does the contract clause of the United States Constitution protect pension rights of California legislators to continued participation in their state pension program, where that right was explicitly granted under the state pension statute, and where the California Supreme Court has for 75 years characterized California public pension rights as protected contractual obligations?

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Respondents.

On Petition for Writ of Certiorari
To the California Supreme Court

BRIEF IN OPPOSITION OF RESPONDENT BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM

Respondent Board of Administration of the Public Employees' Retirement System ("PERS") respectfully requests that this Court deny the petition for writ of certiorari of Intervenor Californians for a Citizen Government ("CCG"), the only party seeking review[1] of that portion of the California Supreme Court's opinion in this case that deals with state pension rights.[2] That opinion is reported *sub nom. Legislature of the State of California et al. v. Eu, et al.* at 54 Cal.3d 492 (1991); the portion of the opinion that strikes down the attempted termination of pre-existing pension rights is reported at 54 Cal.3d 527-34 (CCG Petition at A-47 to A-58).

REASONS WHY THE PETITION SHOULD BE DENIED

The issue in this case is whether the contract clause of the United States Constitution protects California pension rights that the California Supreme Court has unwaveringly characterized as contractual for 75 years, and which were explicitly conferred by statute.

Because contract and property issues are rooted in state law, federal courts grant state courts considerable latitude before intervening to overturn their determinations whether contractual obligations exist. Indeed, in no case cited by petitioner have the federal courts intervened to do what petitioner CCG now asks — to overturn a state

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[1]The only other party who took the same position as CCG below — California Secretary of State March Fong Eu (there represented by the California Attorney General) — has not petitioned for certiorari.

[2]As in the Court below, PERS is not involved in and takes no position on any of the non-pension issues dealt with in the California Supreme Court's opinion, and which are the subject of a separate petition for certiorari, No. 91-1113.

court's determination, based on a uniform course of decision for the last 75 years, that the state has made a contract with its pensioners. The California Supreme Court's decision does no more than hold the state to promises that had been previously characterized as contractual for seven decades. Such a decision does not warrant review.

I.

The California Supreme Court's Characterization Of The State's Treatment Of Its Own Pension Obligations As Contractual Should Be Respected

Contract clause issues require a two step analysis. First, was there a contract in existence? Second, if so, did the action by the state sufficiently impair the contractual obligations to violate the contract clause? *See, e.g., Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938) ("As in most cases brought to this court under the contract clause of the Constitution, the question is as to the existence and nature of the contract and not as to the construction of the law which is supposed to impair it.").

The initial question of whether or not the state intended its own promises to be contractual, or merely to express a mutable public policy preference, depends in the first instance on state law.

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

In consequence, this Court has adopted a policy of deference to state court determinations whether contract rights exist.

> "While we are required to reach an independent judgment as to the existence and nature of the alleged contract, we give great weight to the views of the highest court of the State touching these matters." *Dodge v. Board of Education*, 302 U.S. 74, 79 (1937) (noting that no contract existed under prior Illinois state decisions).
>
> "While this Court in applying the contract clause of the Constitution must reach an independent judgment as to the existence and nature of the alleged contract, we attach great weight to the views of the highest court of the state." *Higginbotham v. Baton Rouge*, 306 U.S. 535, 538-39 (1938) (noting Louisiana's view that no contract existed; citations omitted).

In each of these cases the state court's prior characterization of its state's promises has been a principal concern of this Court.

> "The Supreme Court [of Illinois] answered this contention [that the language of the act at issue indicated an intent to create vested contractual rights] by referring to the fact that for years prior to the adoption of the Miller Law, and by *a uniform course of decision*, it had held that acts indistinguishable from the Miller Law, establishing similar benefit systems, did not create contracts or vested rights and that the State was free to alter, amend, and repeal such laws even though the effect of its action was to deprive the pensioner or annuitant, for the

future, of benefits then enjoyed." *Dodge*, 302 U.S. at 80 (emphasis added).

> "The [Supreme Court of the State of Louisiana] said that the general rule that a municipal council 'may remove at any time any official appointed or elected by the Council, or anyone employed by the Council to perform governmental functions,' had been recognized by its former decisions, which were cited." *Higginbotham*, 306 U.S. at 538-39.

Similarly, in *Pennie v. Reis*, 132 U.S. 464 (1889), the 103-year-old case on which petitioner principally relies, this Court affirmed a prior decision of the California Supreme Court that had concluded that the state legislature had not created any vested rights under the mandatory life and health insurance plan at issue, citing prior California law holding that public officers had no property rights to their office or salary, and that therefore they held only a "mere expectancy." *See Pennie v. Reis*, 80 Cal. 266, 269, 22 P. 176, *aff'd*, 132 U.S. 464 (1889). The California Supreme Court concluded that the challenged statute, which had replaced the prior life and health insurance statute with a comprehensive relief and pension fund (*see* 80 Cal. at 268), "therefore, did not interfere with any vested right, and is not obnoxious to the constitutional principle invoked by petitioner." *Id.* at 269.

Even in *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938), where this Court did overturn the Indiana state court's characterization of a particular obligation as non-contractual, the state court's prior decisions in favor of the existence of a contractual right were a prominent factor in the decision.

> "The courts of Indiana have long recognized that the employment of school teachers was contractual

and have afforded relief in actions upon teachers' contracts." *Id.* at 100-101.

Significantly, this Court was intervening there to uphold the contract, not to destroy contract rights in contravention of prior state decisions as would this petitioner here.

The rule gleaned from this Court's prior cases is that this Court will intervene to overturn a state's characterization of its own obligations only reluctantly, and has never done so for the purpose of dishonoring contractual rights that the state courts previously had found to exist. Indeed, in *Indiana ex rel. Anderson v. Brand*, the only instance of intervention cited by petitioner, this Court noted the state court's own prior decisions that a contract existed, thereby refusing to allow Indiana to dishonor commitments that its courts had previously determined to be contractual.

The federal circuit court decisions cited by petitioners, despite sometimes sweeping language, have similar results. *Compare In re Goodwin*, 57 F.2d 31 (6th Cir. 1932) (no contract pension right found by state court and no impairment found by federal court) *and MacLeod v. Fernandez*, 101 F.2d 20 (1st Cir. 1938) (same), *cert. denied*, 308 U.S. 561 (1939), *with State of Nevada Employees Association v. Keating*, 903 F.2d 1223 (9th Cir.) (contract right found by state court, impairment found by federal court), *cert. denied*, 111 S. Ct. 558 (1990).[3]

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[3]Petitioners have also relied upon a series of federal cases concerning benefits offered by the federal government. *See Deal v. Federal Housing Admin.*, 260 F.2d 793 (8th Cir. 1958) (federal mortgage insurance); *Kizas v. Webster*, 707 F.2d 524 (D.C. Cir. 1983) (FBI hiring preferences), *cert. denied*, 464 U.S. 1042 (1984); *Rafferty v. United States*, 210 F.2d 934 (3d Cir. 1954) (federal pensions); *Abbott v. Morgenthau*, 93 F.2d 242 (D.C. Cir. 1937) (same), *cert. denied*, 303

The importance of a state court's prior decisions was explained in *Dodge*, where this Court indicated that evidence of a state's intent whether or not to be contractually bound could be gleaned from the legislature's presumed knowledge of the existing law in that state.

> "The [state] court further held that the legislature presumably had the doctrine of these cases in mind when it adopted the act now under review and that the appellants should have known that no distinction was intended between the rights conferred on them and those adjudicated under like laws with respect to other retired civil servants. We cannot say that this was error." *Dodge*, 302 U.S. at 81.[4]

In California for the last 75 years there has been "a uniform course of decision" (*see Dodge*, quoted *supra*, at p. 4-5) holding that California public pension obligations are contractual obligations giving rise to vested rights. *See, e.g.*, the cases cited by the California Supreme Court in its decision below (Pet. at A-48 to A-49): *Allen v. Board of Administration*, 34 Cal.3d 114, 192 Cal.Rptr. 762, 665 P.2d 534 (1983) *appeal dismissed*, 465 U.S. 1015 (1984); *Olson v. Cory*, 27 Cal.3d 532, 178 Cal.Rptr. 568, 636 P.2d 532 (1980); *Betts v. Board of Administration*, 21 Cal.3d 859, 148 Cal.Rptr. 158, 582 P.2d 614 (1978); *Miller v.*

U.S. 638 (1938). These cases are inapposite because it has long been decided that the contract clause does not apply to the actions of the federal government. *New York v. United States*, 257 U.S. 591, 601 (1922) ("That section provides that 'no *State* shall . . . pass . . . any law impairing the obligation of contracts,' and does not in terms restrict Congress or the United States.") (emphasis in original).

[4] *See also United States Trust v. New Jersey*, 431 U.S. 1, 19 n. 17 (1977) ("The obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement.").

State of California, 18 Cal.3d 808, 135 Cal.Rptr. 386, 557 P.2d 970 (1977); *Allen v. City of Long Beach*, 45 Cal.2d 128, 287 P.2d 765 (1955); *Kern v. City of Long Beach*, 29 Cal.2d 848, 179 P.2d 799 (1947); *see also Frank v. Board of Administration*, 56 Cal.App.3d 236, 242, 128 Cal.Rptr. 378 (1976) ("A contractual right is not an expectancy but a chose in action, a form of property which the employee acquires when he enters upon performance of the employment contract.").

Even before the 1947 *Kern v. City of Long Beach* decision, the California Supreme Court had firmly rejected the "gratuity" approach to public pensions and given them a contractual basis. The idea that public pensions in California were mere gratuities was rejected as early as 1917 in *O'Dea v. Cook*, 176 Cal. 659, 661-62, 169 P. 366 (1917):

> "A pension such as this law contemplates is not a gratuity or a gift . . . . [W]here, as here, services are rendered under such a pension statute, the pension provisions become a part of the contemplated compensation for those services and so in a sense a part of the contract of employment itself."

This position was reaffirmed 11 years before *Kern* in *Dryden v. Board of Pension Commissioners*, 6 Cal.2d 575, 59 P.2d 104 (1936):

> "The deceased was a member of the police department for approximately fourteen years before his death, during the entire period of which he paid his required 4 percent of each salary check received. *A pension based upon such facts is not a gratuity.* It is a periodical allowance of money granted by the city in consideration of services rendered or of loss or injury sustained, *and* payments made for that purpose.

> It has been clearly held that the pension provisions of the city charter are an integral portion of the contemplated compensation set forth in the contract of employment between the city and a member of the police department, and are an indispensible part of that contract, and that the right to a pension becomes a vested one upon acceptance of employment by the applicant." 6 Cal.2d at 578-79 (emphasis added).[5]

In its decision below the California Supreme Court first noted that "under both the federal and state contract clauses" California had afforded contractual protection for California public pensions generally. (Pet. at A-48-49.) Having elected to treat legislators like other public employees, California was not now free to change its mind.

> "The state, in adopting the LRS, elected to treat legislators in a manner similar to other state employees, providing them with a plan whereby pension benefits could be acquired through continued service beyond their initial term of office. Having done so, the state cannot thereafter abandon that plan as to incumbent legislators without providing them comparable new benefits." Pet. at A-53.

The differences cited by petitioner among other state courts,[6] as to whether or not their states grant contrac-

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[5]In its criticism of *Kern* as a contravention of *stare decisis*, the petition overlooks the earlier 1936 *Dryden* and 1917 *O'Dea* cases, which had previously recognized the contractual nature of public pensions in California.

[6]Useful summaries of the differing approaches undertaken by the various states can be found in Annot., *Vested right of pensioner to pension*, 52 A.L.R.2d 437 (1957); Comment, *Pensions: Public Employee Pension Plans As Contractual Obligations Granted Constitu-*

tual protection to public pensions, do not invalidate another state's power to incur contractual obligations to its own pensioners. *Cf. United States Trust v. New Jersey*, 431 U.S. at 24 ("Whatever the propriety of a State's binding itself to a future course of conduct in other contexts, the power to enter into effective financial contracts cannot be questioned."); *Dodge v. Board of Education*, 302 U.S. at 78 ("The parties agree that a state may enter into contracts with citizens, the obligation of which the legislature cannot impair by subsequent enactment.").

In sum, petitioner has cited no case in which this Court has intervened to overturn a state court's decision holding the state to its contractual obligations. Indeed, petitioner has failed to cite any case in which this Court, or any other federal court, has overruled a state court's prior uniform course of decision whether state contractual obligations exist. There is no reason in this case to depart from this Court's usual presumption that a state's supreme court ordinarily is the best judge of contract rights granted under state law.

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tional Protection, 20 Washburn L.J. 169 (1980); Achelpohl, *Public Pensions in Nebraska: Good News For The Public Employee*, 16 Creighton L.Rev. 63 (1982); Case Note, *Public Employee Pension Benefits — A Promissory Estoppel Approach*, 10 Wm. Mitchell L.Rev. 287 (1984). In brief, these commentaries disclose the evolution in policy among various states from the "gratuity" approach to the "compensation" approach. *See also Bender v. Anglin*, 207 Ga. 108, 60 S.E.2d 756 (rejecting *Pennie* approach), *cert. denied*, 340 U.S. 878 (1950).

II.

The Prospective Pension Rights Are Protected Because They Were Specifically Included In The Statute At Issue In This Case

Proposition 140 itself acknowledged that the California pension system created vested contractual rights protected from impairment by the contract clause. The initiative declares that "This Section shall not be construed to abrogate or diminish any vested pension or retirement benefit which may have accrued under an existing law. . . ." California Constitution, Article IV, Section 4.5. The issue, therefore, was not the existence of protected vested pension rights, which was conceded, but whether those rights included the ability to continue to accrue service credit for continued time in office after November 1, 1990.

The answer is right in the pension statute. California Government Code § 9356 (Pet. at B-9) provides:

> "Each member of this system shall receive credit for service for time during which he holds office as a legislator after becoming a member of this system."

By cutting off the right to accrue service credit for time during which a legislator held office after November 1, 1990, Proposition 140 contradicted an explicit term of the specific scheme under which the incumbent legislators had served. By protecting the prospective right to continue to accrue service credit into the future, the California Supreme Court was doing no more than holding the state to the explicit promise that it had previously made.

CONCLUSION

The issue in this case is not whether the contract clause protects all pension rights. The issue is whether the contract clause protects public pension rights that California's Supreme Court has unwaveringly characterized as contractual obligations for 75 years, and which were explicitly granted by statute under the voluntary plan at issue. Under these circumstances, there is no need to second-guess a decision of California's highest court that the state's obligations under such a plan are contractual in nature, and hence are protected from impairment by the contract clause of the United States Constitution.

The decision below is compatible with the decisions of this Court, which give great weight to state court determinations whether contract rights exist, and which have unfailingly recognized the existence of contracts that have been conceded to exist by the states involved. The differences among some state courts, as to whether their states grant contractual protection to public pensions, do not invalidate a state's power to incur contractual obligations to its own pensioners. Accordingly, the Petition of CCG for a Writ of Certiorari should be denied.

Respectfully submitted,

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